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No. 03-160

IN THE

Supreme Court of the United States

ADVOCAT, INC., DIVERSICARE LEASING CORPORATION, d/b/a RICH MOUNTAIN NURSING AND REHABILITATION CENTER, and DIVERSICARE MANAGEMENT SERVICES COMPANY,

Petitioners,

v.

LON C. SAUER, Individually, and as Administrator of the Estate of MARGARETHA SAUER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in reviewing the constitutionality of the punitive damages awards in this case, the Arkansas courts violated procedural due process by refusing to consider evidence that the defendants offered post-trial regarding their financial condition when the defendants (i) had not introduced that evidence at trial and (ii) had objected to the plaintiff's offering it.

2. Whether the remitted punitive damages award of $21 million is arbitrary and excessive in violation of due process under the constitutional analysis set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), when that analysis is properly applied.

3. Whether the Supreme Court of Arkansas's imposition of joint and several liability for the remitted punitive damages award violated the due process clause.

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STATEMENT OF THE CASE

Factual Background. This case presents one of the more squalid fact situations ever to come before this Court. While in the care of Rich Mountain Nursing and Rehabilitation Center, Margaretha Sauer was repeatedly left to lie in her own waste for such long periods of time that excrement dried to her skin and brown circles or halos of dried urine formed around her body on the sheets of her bed. She was repeatedly found to have excrement under her fingernails. She developed pressure sores on her buttocks and on her back. She developed blisters between her legs. One record notes that her blisters were bleeding. Some of these sores and blisters were as large as a softball or an adult fist and two or three centimeters deep. These sores and blisters were caused by neglect. As much as five days passed without a change of wound dressings. The sores became infected.

Mrs. Sauer also developed contractures, a painful condition in which the limbs of a person contract and lose their range of motion. Mrs. Sauer had contractures in all four limbs. She was in a fetal position. Both of her arms were drawn up, and her hands were closed. This condition is caused by neglect.

Witnesses testified that Mrs. Sauer "was always thirsty." She told one of her sons that she would probably die hungry. During the last month of her life, she lost 15 pounds without her doctor's being notified. For the last 24 to 48 hours of her life, she was given nothing to eat or drink. Upon her final hospitalization, there was a greenish, foul-smelling discharge from her vagina that had not been noticed or addressed at the nursing home.

Mrs. Sauer died "from severe malnutrition and dehydration." Pet. App. 8a. The nursing home records show that she ate everything that she was offered for breakfast on the last two days of June 1998, yet she was fed little or not at all in July 1998. She died on July 19, 1998. She could have been hydrated intravenously, but that was not done. According to one expert witness at trial, the failure to provide appropriate nutrition and hydration, which resulted in Mrs. Sauer's death, was an "outrageous deviation from the standard of care." Another expert testified that this conduct was "absolutely below the standard of care. I would call it conscious indifference."

The evidence at trial established that the neglect and ultimate death of Mrs. Sauer were caused by inadequate staffing and inadequate resources at the nursing home. Employees of the nursing home complained on many occasions about inadequate staffing, and they complained about the lack of supplies to care for the residents properly. They were told to quit complaining.

Mark Hemingway, the divisional vice president for the management company, Diversicare Management Services Company, testified that he was aware of the problems with short-staffing at the nursing home and that he discussed these problems with his supervisor, the vice president of operations. Mr. Hemingway attributed the short-staffing to a shift in corporate philosophy beginning in 1996, "when they started talking more about cost-cutting than quality." Prior to this time, Mr. Hemingway could not recall this facility's having any in-house generated bedsores. Mr. Hemingway was fired when he did not reduce staff to meet budget.

Evidence showed that the Petitioners (the "Advocat Defendants") knew that the facility was inadequately staffed and that the Office of Long-Term Care ("OLTC") of the State of Arkansas would take action if this inadequate staffing were discovered. Rather than correct the inadequate staffing, the Advocat Defendants attempted to deceive the OLTC and the families of residents. During OLTC inspections, the Advocat Defendants brought in employees from other facilities, who disappeared after the inspectors left. They placed uncertified personnel on the floors to create a false appearance that the facility was adequately staffed. They directed employees to falsify charts to make it appear that certified personnel were providing care while they were absent.

All three of the Advocat Defendants participated in the management and direction of this nursing home. Diversicare Leasing Corporation, d/b/a Rich Mountain Nursing and Rehabilitation Center, owned the facility and employed most of the staff. A management agreement provided that Diversicare Management had "full, exclusive control and responsibility of the management of the facility and its operations in all respects." This responsibility, according to the management agreement, included hiring and supervising staff, establishing and maintaining a system of patient care, supervising inventories, and preparing budgets. Diversicare Management prepared policies and procedures manuals to guide the facility. Diversicare Management received a management fee based on a percentage of the facility's revenue. Diversicare Management employed the facility's administrator. Diversicare Management employees instructed the facility's employees to falsify records in order to deceive the OLTC.

Both Diversicare Leasing and Diversicare Management are wholly owned by Advocat, Inc. Advocat, Inc., was paid a fee for "general oversight" of the facility. The budgets were submitted to Advocat, Inc., which instructed the personnel of Diversicare Management or Diversicare Leasing what changes needed to be made in those budgets. Advocat, Inc., implemented a program called "Continuous Quality Improvement" to direct the quality of care in the nursing home. Yet, the Advocat, Inc., board of directors approved the budget without even considering reports concerning the care of the residents or results of surveys from the OLTC. A bonus system rewarded persons who met Advocat, Inc.'s budget.

Mary Margaret Hamlett, former chief financial officer and member of the board of directors of Advocat, Inc., testified, "I can tell you from the company's perspective these were one. These were operated as if it was one company." Ms. Hamlett stated that, while Diversicare Management and Diversicare Leasing legally were separate entities, they were operated as one nursing home division of the parent company. All of the money collected from the operation of the nursing home at issue was deposited into a regional account in Nashville, Tennessee, and "used to pay bills for the whole company." Mrs. Hamlett testified by video deposition. Her exact testimony was known long before trial. Yet, her testimony was uncontradicted at trial.

Ms. Hamlett also testified, without objection, regarding the extent of the Advocat Defendants' operations. Pet. App. 18a. Still, no evidence was introduced regarding the Advocat Defendants' misconduct in states other than Arkansas or at nursing homes other than the one where Mrs. Sauer resided.

Procedural History. The Sauer Estate's complaint asked for judgment jointly and severally against the Advocat Defendants for both compensatory and punitive damages. In their answer, the Advocat Defendants objected to the determination of the amount of punitive damages based on corporate wealth, and they objected to the determination of the amount of punitive damages without bifurcating the trial. Before trial, the Sauer Estate filed a motion to bifurcate the trial pursuant to Ark. R. Civ. P. 42(b), which is substantially identical to Fed. R. Civ. P. 42(b). The Sauer Estate asked the court to bifurcate the trial so that financial information pertaining to the Advocat Defendants' net worth and the amount of punitive damages would be introduced at a second phase of the trial, only after the jury had already determined liability and the amount of compensatory damages. Contrary to the position taken in their answer, the Advocat Defendants then objected to bifurcating the trial. The Advocat Defendants also moved *in limine* to exclude evidence of their financial condition. The trial court ruled in favor of the Advocat Defendants on both motions.

Following an eight-day trial, the jury returned verdicts for compensatory damages totaling $15.425 million, as well as verdicts for punitive damages of $21 million against each of the Advocat Defendants. The Advocat Defendants filed a Motion for Judgment Notwithstanding the Verdict and Remittitur or, in the Alternative, for New Trial. They filed with their motion an affidavit of William R. Council, who was then the Advocat Defendants' chief financial officer. He now is their chief executive officer. Attached to Mr. Council's post-trial affidavit was a one-page Subsidiary Balance Sheet Summary as of April 30, 2001, with columns for Diversicare Leasing, Diversicare Management, Advocat on an unconsolidated basis, and Advocat on a consolidated

basis. Also attached was a Form 10-Q for the quarterly period ended March 31, 2001, for Advocat, Inc. This 10-Q reported Advocat, Inc.'s financial results on a consolidated basis. The notes to the consolidated financial statement included a two-page discussion of "Insurance Matters" in which the professional liability insurance available to the company and the premiums to be paid for that insurance were discussed.

The Sauer Estate moved to strike the affidavit. The Sauer Estate also filed certificates from the Advocat Defendants' liability insurance carriers and excess insurance carriers showing that the Advocat Defendants had liability coverage, including excess coverage, totaling $95 million to pay the judgments.

The trial court declined to consider the post-trial evidence offered by the Advocat Defendants because that evidence had not been introduced at trial and likewise declined to consider the post-trial evidence offered by the Sauer Estate. Based on the evidence introduced at trial, the trial court reviewed the punitive damage awards in light of each of the three factors articulated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and concluded that two of the three *Gore* factors had been met in this case. Pet. App. 39a-51a. The trial court declined to order a remittitur or a new trial. Thereafter, the Advocat Defendants' insurers collectively posted supersedeas bonds totaling $86,267,500.

On appeal to the Supreme Court of Arkansas, the Advocat Defendants raised one evidentiary issue,[1] two challenges to

1. The evidentiary issue related to the admission of two redacted OLTC surveys showing that the nursing home at issue was understaffed while Mrs. Sauer was a resident. As noted above, no evidence (Cont'd)

the jury instructions, challenges to the sufficiency of the evidence, and arguments that both the compensatory damage awards and the punitive damage awards were excessive. Pet. App. 1a-2a. The Supreme Court of Arkansas found that the one evidentiary challenge was without merit; ruled that no challenge to the jury instructions had been preserved and that the jury instructions were proper in any event; ruled that the challenges to the sufficiency of the evidence had been waived because the Advocat Defendants failed to renew their motion for a directed verdict at the conclusion of all the evidence; ordered a remittitur of the compensatory damages to $5.425 million[2]; and ordered a remittitur of the punitive damages to $21 million, all to be assessed jointly and severally. Pet. App. 1a-38a. The Supreme Court affirmed the trial court's decision to consider only evidence introduced at trial. Pet. App. 17a. The Advocat Defendants did not file a petition for rehearing as permitted by Rule 2-3 of the Rules of the Supreme Court of Arkansas.

(Cont'd)
was introduced of alleged misconduct by the Advocat Defendants in other states, so no issue was raised on appeal regarding evidence of misconduct in states other than Arkansas.

2. Damages totaling $425,000 were not contested on appeal. Pet. App. 9a, n. 2. The court ordered a remittitur of the remaining compensatory damages to $5 million.

REASONS FOR DENYING THE PETITION

I. THE CHALLENGE TO THE ARKANSAS PROCEDURAL RULES PRESENTS NO IMPORTANT FEDERAL QUESTION.

The linchpin of the Advocat Defendants' petition for a writ of certiorari is the assertion that the Arkansas procedural rules violate the due process clause of the Fourteenth Amendment by requiring each party to present during trial whatever evidence that party has to support its claim or defense. Apart from the argument that it is unconstitutional to require a litigant to present all evidence during trial, the Advocat Defendants have no basis for saying that the punitive damages award, as remitted, would render them insolvent because they presented no evidence on that issue during trial. Indeed, they objected to the introduction of that evidence. The Advocat Defendants recognize that this argument is essential to their petition when they say that the "principal reason that the award must be deemed constitutionally excessive is that the award would render all of the defendants insolvent – a fact that the Arkansas courts refused to consider." Petition for Writ of Certiorari at 23. No authority exists for the proposition that requiring a litigant to present all of its evidence during trial creates an issue under the due process clause nor any other provision in the United States Constitution. No conflict of authority exists on this point inasmuch as no court has ever held that requiring all evidence to be presented during trial violates the due process clause.

Arkansas provides a full array of procedural protections for defendants against whom punitive damages are sought.[3]

3. We describe the protections in effect at the time of trial. The Arkansas legislature has since enacted the Civil Justice Reform Act of 2003, Act 649 of 2003, which increases the protections beyond those described here.

Arkansas law permits the jury to be instructed that it may consider the financial condition of the defendant in arriving at the amount of punitive damages. AMI Civil 4th, 2218. The note on the use of this instruction says that it should be given only if there is evidence of a defendant's financial condition. *Id.* Here, since the Advocat Defendants objected to the introduction of evidence of their financial condition, that portion of AMI 2218 was omitted. Thus, the jury was not instructed that it could consider the Advocat Defendants' financial condition, nor did any party request such an instruction. If a plaintiff in Arkansas wishes to introduce evidence of a defendant's financial condition for the jury's consideration in arriving at the amount of punitive damages, the court must conduct a hearing to determine whether the plaintiff has proven that the evidence is sufficient to support submitting punitive damages to the jury. *Wortman v. Shipman*, 293 Ark. 253, 259-60, 737 S.W.2d 438, 442 (1987); *Curtis v. Partain*, 272 Ark. 400, 614 S.W.2d 871 (1981), *overruled on other grounds by Lupo v. Lineberger*, 313 Ark. 315, 855 S.W.2d 293 (1993). If the defendant wishes to offer evidence of its financial condition to mitigate the amount of punitive damages, the defendant may do so. *Holmes v. Hollingsworth*, 234 Ark. 347, 352-53, 352 S.W.2d 96, 99 (1961). In a case with multiple defendants, the defendants may choose to exclude evidence of their financial condition, as the Advocat Defendants chose to do here. But they are not required to exclude that evidence. Either party may ask the court to bifurcate the trial so that evidence pertaining to the financial condition of the defendant does not taint the jury's consideration of liability or compensatory damages. Ark. R. Civ. P. 42(b); Brill, ARKANSAS LAW OF DAMAGES (3d Ed.) § 9-4. As noted, the Sauer Estate requested a bifurcated trial, but the Advocat Defendants objected.

Following trial, a defendant who believes that the punitive damage award is excessive may ask the trial court to review the punitive damage award for excessiveness and may appeal the trial court's determination. On appeal, as a matter of Arkansas common law, the Supreme Court of Arkansas reviews the issue *de novo*, considering the extent and enormity of the wrong, the intent of the party committing the wrong, all of the circumstances, and the financial and social condition and standing of the erring party. Pet. App. 16a. The federal courts have held that the Arkansas standard meets the requirements of the United States Constitution. *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 779 F. Supp. 994 (W.D. Ark. 1991), *aff'd*, 14 F.3d 373 (8th Cir. 1993), *cert. denied*, 511 U.S. 1115 (1994).

The Arkansas procedure is precisely the type of judicial review of the amount of a punitive damage award that this Court approved as "a well-established common-law protection" against excessive punitive damage awards in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). As this Court stated in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991), "every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process." No authority exists, and no good-faith argument exists, for declaring that this procedure is insufficient under the due process clause of the Fourteenth Amendment.

While *Haslip* arose from Alabama, neither *Haslip* nor any other case has ever held that the due process clause requires the other 49 states to adopt Alabama's procedure. Alabama prohibits the introduction of evidence pertaining to the defendant's financial condition during trial.

Indus. Chem. & Fiberglass Corp. v. Chandler, 547 So. 2d 812, 836 (Ala. 1989). If a defendant believes that the punitive damage award is excessive, under Alabama procedure, that defendant may petition the court for a post-trial hearing at which evidence can be received. *Id.* at 838-39. Alabama is in a distinct minority. California, in contrast, imposes on a plaintiff the burden of introducing evidence, during trial, of a defendant's financial condition as a prerequisite to an award of punitive damages. *Adams v. Murakami*, 813 P.2d 1348 (Cal. 1991); *Chavez v. Keat*, 41 Cal. Rptr. 2d 72 (4th Dist. App. 1995). Thus, while Alabama prohibits the introduction at trial of evidence of the defendant's financial condition, California requires it.

The procedure followed in Arkansas is the procedure of the vast majority of state and federal courts. Arkansas neither prohibits nor requires the introduction of a defendant's financial condition during trial. However, if either party wishes the fact-finder to consider the defendant's financial condition, that evidence must be introduced during trial.

In *Grabinski v. Blue Springs Ford Sales, Inc.*, 136 F.3d 565, 570-71 (8th Cir. 1998), the Eight Circuit held that, under federal law, the failure of defendants to put on evidence of their net worth at trial constituted a waiver. The Eighth Circuit affirmed the trial court in refusing to consider post-verdict affidavits of net worth. *Id.* The holding of the Eighth Circuit in *Grabinski*, like the holding of the Supreme Court of Arkansas in this case, is consistent with the great weight of authority in imposing the burden on the defendant to introduce evidence at trial to show that punitive damages should be limited due to the defendant's financial circumstances. *See Provost v. City of Newburgh*, 262 F.3d 146, 163 (2d Cir. 2001) (it is the defendant's burden to present

evidence of his limited resources if he wishes that to be considered after trial); *Kemezy v. Peters*, 79 F.3d 33, 36 (7th Cir. 1996) (the burden of presenting evidence of net worth is on the defendant); *Smith v. Lightning Bolt Prod., Inc.*, 861 F.2d 363, 373-74 (2d Cir. 1988) (defendant's failure to introduce evidence of his financial condition during trial constitutes a waiver); *Tri-Tron Intern. v. Velto*, 525 F.2d 432, 438 (9th Cir. 1975) (the injured party is not required to introduce evidence of the misappropriator's ability to pay); *El Ranco, Inc. v. First Nat'l Bank of Nevada*, 406 F.2d 1205, 1218-19 (9th Cir. 1968) (a defendant who did not introduce evidence of his ability to pay may not argue that the amount of punitive damages will destroy him); *Laughinghouse v. Risser*, 786 F. Supp. 920, 926-27 (D. Kan. 1992) (due process does not require plaintiff to prove defendant's financial condition). Requiring the defendant to bring forward evidence to show his inability to pay is in accord both with federal case law and with general principles of allocating burdens of proof and of producing evidence. The party who controls the evidence should have the burden of producing it. The defendant who chooses to remain silent about his financial status "must now live with that choice." *Littlefield v. Mack*, 750 F. Supp. 1395, 1402 (N.D. Ill. 1990).

The majority of states agree with these federal decisions and thus with the Arkansas courts. *See Hall v. Wal-Mart Stores, Inc.*, 959 P.2d 109, 113 (Utah 1998) (a majority of the courts hold that a defendant must present to the jury evidence of his inability to pay a large award of punitive damages); *Kochan v. Owens-Corning Fiberglass Corp.*, 610 N.E.2d 683, 694 (Ill. App. 5th Dist. 1993) (defendant did not offer evidence of its financial status and cannot now complain of its absence); *C & C Trucking Co. v. Smith*, 612 So. 2d 1092, 1105 (Miss. 1992) (if no evidence of the net

worth of the defendant is introduced during trial, neither party may challenge on appeal the inadequacy or the excessiveness of a punitive damages award); *Nienstedt v. Wetzel*, 651 P.2d 876, 885 (Ariz. App. 1982) (a defendant may not complain of the absence of evidence of his wealth when he made no effort to introduce such evidence); *Rinaldi v. Aaron*, 314 So. 2d 762, 765 (Fla. 1975) (evidence of financial worth is admissible but is not a requisite to an award of punitive damages); *Parker v. Hoefer*, 100 A.2d 434, 447 (Vt. 1953) (the defendant may introduce evidence of his wealth to mitigate an award of punitive damages).

"[T]he proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible." *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996). Likewise, the proposition that the due process clause guarantees the right to wait until after trial to introduce relevant evidence is simply indefensible. "Relevant evidence may . . . be excluded on account of a defendant's failure to comply with procedural requirements." *Id.* "The Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules." *Id.* at 43, quoting *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983). The Advocat Defendants advance an argument that is "simply indefensible"; and, in doing so, they invite the Court to grant certiorari in order to engage in "a finely tuned review" of the wisdom of state procedural rules. The Court should deny the invitation.

II. THE ADVOCAT DEFENDANTS DID NOT PRESERVE THE ARGUMENT THAT THE DUE PROCESS CLAUSE REQUIRES RECEIPT OF EVIDENCE, AFTER TRIAL, ON THE DEFENDANTS' FINANCIAL CONDITION NOR THAT THE PUNITIVE DAMAGE AWARDS EXCEEDED THE DEFENDANTS' NET WORTH AND, FOR THAT REASON, VIOLATE DUE PROCESS.

In their opening brief filed in the Supreme Court of Arkansas, the Advocat Defendants noted that, under state law, the Supreme Court of Arkansas reviews punitive damages *de novo* and considers, among other things, the financial and social condition and standing of the wrongdoer. Abstract and Brief of Appellant at 490. The Advocat Defendants argued that the trial court erred by failing to consider the post-trial affidavit "*under its state-law duty* to review punitive damages for excessiveness." Abstract and Brief of Appellants at 491 (emphasis added). However, the Advocat Defendants did not argue in their opening brief that the due process clause of the Fourteenth Amendment required the trial court to consider the post-trial affidavit, nor did the Advocat Defendants argue that the due process clause prohibits a punitive damage award exceeding the defendants' net worth. Abstract and Brief of Appellants at 486-90. Hence, those arguments were waived. *Yam's Inc. v. Moore*, 319 Ark. 111, 115, 890 S.W.2d 246, 248 (1994); *John Cheeseman Trucking, Inc. v. Dougon*, 313 Ark. 229, 238, 853 S.W.2d 278, 283 (1993).

In the due process argument of their opening brief, the Advocat Defendants did argue that the punitive damages could destroy them and the entire nursing home industry in

Arkansas, but that argument was based on the assertion that "[t]hese verdicts threaten the willingness of insurance companies to write policies in Arkansas for nursing homes and this could shut down the industry." Abstract and Brief of Appellants at 489. That argument, of course, was not based on any evidence in the record. That kind of argument is more appropriate for the legislature than for the courts, and the Arkansas legislature has addressed it. Civil Justice Reform Act of 2003, Ark. Act 649 of 2003. For present purposes, however, the important point is that the argument now made by the Advocat Defendants in their petition for a writ of certiorari was addressed to the Supreme Court of Arkansas as an issue of state law, not an issue arising under the due process clause.

The opinion of the Supreme Court of Arkansas shows that the court addressed the argument regarding the post-trial affidavit as an issue of state law, not as an issue arising under the due process clause. Pet. App. 16a-26a. When the Supreme Court of Arkansas addressed this issue as one of state law but not of federal law, the court did precisely what the Advocat Defendants asked the court to do in their opening brief. Hence, the argument that the Advocat Defendants now make has not been preserved for review by this Court. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993) (a point not "squarely argue[d]" in the state supreme court is waived); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988) (there should be no doubt that the substance and nature of the federal claims were raised below in the time and manner required by state law).

III. THE PUNITIVE DAMAGE AWARDS WILL NOT RENDER THE DEFENDANTS INSOLVENT.

It was not accidental that the Advocat Defendants mentioned the potential impact of this judgment on their *insurers* in their brief filed in the Supreme Court of Arkansas. After the Advocat Defendants filed the post-trial affidavit of Mr. Council (with the one-page balance sheet and Advocat, Inc.'s 10-Q for the quarter ended March 31, 2001), the Sauer Estate filed certificates of insurance from the Advocat Defendants' liability carriers showing that the Advocat Defendants have insurance coverage exceeding $90 million available to cover the judgment in this case. Between the trial and the remittitur on appeal, in its 10Ks and 10-Qs filed with the Securities and Exchange Commission, the Advocat Defendants consistently reported that the judgment of $78.425 million would be covered by insurance pursuant to the 1997 and 1998 insurance programs.[5] Likewise, in each of those statements to shareholders and to the Securities and Exchange Commission, the Advocat Defendants reported that, based on the insurance coverage in effect at the time of the Sauer claim, the verdict amount has not been accrued as a liability on the company's books. After the Supreme Court of Arkansas ordered a remittitur of the total judgment to $26.425 million, Advocat, Inc., reported that the reduced

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4. Arkansas law permits an insurer to indemnify an insured for punitive damages. *Southern Farm Bureau Cas. Ins. Co. v. Daniel*, 246 Ark. 849, 440 S.W.2d 582 (1969).

5. *See* Advocat, Inc.'s 10K for year end 2001, p. 2; Advocat, Inc.'s 10K for year end 2002, p. 3; Advocat, Inc.'s 10-Q for quarter ended March 31, 2002, p. 19; Advocat, Inc.'s 10-Q for quarter ended September 30, 2002, p. 12. All of these documents are publicly available at *www.sec.gov.*

amount was within the company's insurance coverage.[6] Moreover, on August 13, 2003 – two weeks after the Advocat Defendants filed their Petition for a Writ of Certiorari in this Court – Advocat, Inc., filed its 10-Q for the quarter ended June 30, 2003, and reported:

> On June 22, 2001, a jury in Mena, Arkansas issued a verdict in a professional liability lawsuit against the Company totaling $78.425 million. The Company appealed this verdict to the Arkansas Supreme Court in a hearing that took place March 13, 2003. On May 1, 2003, the Arkansas Supreme Court issued a decision on the Company's appeal, reducing the damages to $26.425 million, plus interest from the date of the original verdict. The Company is presently seeking to obtain review of the appellate court's judgment by the United States Supreme Court. If the reduced judgment is upheld, the Company believes the settlement amount will be within the Company's insurance coverage.[7]

Hence, after the Advocat Defendants filed their petition stating to this Court that the judgment, even as remitted, was far in excess of their ability to pay and would render them insolvent, they reported to the SEC that the judgment will be covered by insurance.

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6. *See* Advocat, Inc.'s 10-Q for quarter ended March 31, 2003.

7. Advocat, Inc.'s 10-Q for quarter ended June 30, 2003, p. 11. As noted above, the insurers collectively have posted bonds totaling more than $86 million to supersede the judgment.

"The defendant should not be allowed to plead poverty if his employer or an insurance company is going to pick up the tab." *Kemezy*, 79 F.3d at 37; *Hall*, 959 P.2d at 113 n.7. "It would be entirely inappropriate for a defendant to raise the issue of his limited financial resources if there existed an indemnity agreement placing the burden of paying the award on someone else's shoulders." *Mathie v. Fries*, 121 F.3d 808, 816 (2d Cir. 1997). *See also Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 910 (W. Va. 1991); *Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 38-39 (Tex. 1998). In evaluating a defendant's argument about the excessiveness of punitive damages, it is appropriate for a court to consider statements by the defendant to shareholders and to the SEC that the judgment will not have a material adverse effect on the company's financial position. *Malone*, 972 S.W.2d at 53.

The Sauer Estate raises these issues because Rule 15.2 requires that briefs in opposition point out to the Court "any perceived misstatement made in the petition." In this instance, the Advocat Defendants' petition repeatedly states that the judgment, as remitted, threatens to destroy them financially. Indeed, the Advocat Defendants say that this is the "principal reason that the award must be deemed constitutionally excessive." Petition for Writ of Certiorari at 23. These statements are untrue. They are contrary to what the Advocat Defendants have reported to their shareholders and to the Securities and Exchange Commission.

IV. NO IMPORTANT FEDERAL QUESTION IS RAISED BY THE FINDING THAT THE ADVOCAT DEFENDANTS OPERATED AS ONE BUSINESS AND THE CONCOMITANT IMPOSITION OF JOINT AND SEVERAL LIABILITY.

Prior to trial, the Advocat Defendants submitted jury instructions that treated all three of them as a single entity. They submitted a verdict form for a general verdict against "the defendants" without distinguishing among them. At trial, by video deposition, the former chief financial officer of the Advocat Defendants testified that the Advocat Defendants were operated as one business and that they commingled their funds, paying bills for "the whole company" from a single account. Although an Arkansas model instruction, which was given in this case, instructs the jury to consider each defendant's case separately, the Advocat Defendants did not request the instruction. At trial, the Advocat Defendants were content to allow the case to go to the jury with instructions that treated all of the Advocat Defendants as one. On appeal, they contended that the jury instructions erroneously treated the Advocat Defendants as one, but the Supreme Court of Arkansas noted that the Advocat Defendants had not so objected at trial. Pet. App. 33a-38a. Specifically with reference to the punitive damage instruction, the Advocat Defendants argued "the punitive damages instruction, a modified version of AMI 2218, erroneously permitted the jury to punish all three defendants for the conduct of only one. . . . Although there was no objection to the form of this instruction, it was clear error." Abstract and Brief of Appellants at 488. Arkansas does not have a plain error rule. *Stacks v. Jones*, 323 Ark. 643, 646-47, 916 S.W.2d 120, 122 (1996).

In ruling, post-trial, on whether the punitive damages were excessive, the trial court expressly found that the Advocat Defendants were operated as one business. That the trial court so found cannot create any due process issues since the finding was based on uncontradicted evidence. *Cf. Haslip*, 499 U.S. at 14. Moreover, since the trial court made that finding, the Advocat Defendants had ample notice that this was an issue to be addressed in their brief on appeal, and, indeed, they did address the issue at some length. Abstract and Brief of Appellants at 488, 492-96. Nevertheless, the Supreme Court of Arkansas, upon *de novo* review of the *Gore* factors, also held that the Advocat Defendants operated as one company. The Advocat Defendants asked the Supreme Court of Arkansas to review the record *de novo* in determining the amount of punitive damages was excessive, and the court did so. The complaint by the Advocat Defendants that the Supreme Court of Arkansas "made its own determination that the defendants shall be treated as a single entity for purposes of the *Gore* analysis"[8] comes with ill grace since the Advocat Defendants urged the court to engage in a *de novo* review. The finding that the Advocat Defendants were operated as one company is not a decision of any important federal question and therefore does not create any basis for certiorari.

Nor does the imposition of joint and several liability, on the facts of this case, create any important federal question. Whether, or under what circumstances, to impose joint and several liability for punitive damages is a matter of state law. Some states permit the imposition of joint and several liability for punitive damages, but others do not. The rule in the District of Columbia, for example, is that persons who jointly participate in wrongful conduct may be jointly and severally

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8. Petition for Writ of Certiorari at 9.

liable for punitive damages. *Jemison v. Nat'l Baptist Convention, U.S.A., Inc.*, 720 A.2d 275, 286 (D.C. 1998). The federal courts sometimes impose joint and several liability for punitive damages. *Vincente v. Obenover*, 736 F. Supp. 679, 696 (E.D. Va. 1990). The Arkansas cases long before this one permitted joint tortfeasors to be jointly and severally liable for punitive damages. *Mo. Pac. R. Co. v. Ark. Sheriff's Boys' Ranch*, 280 Ark. 53, 59, 655 S.W.2d 389, 392 (1983). No authority exists for the proposition that the decision whether to impose joint and several liability on joint tortfeasors is an important federal question.

In truth, the Advocat Defendants' arguments on this point are rehashed versions of their arguments below that the evidence was insufficient to find Diversicare Management Services Company and Advocat, Inc., liable for negligence or medical malpractice. Abstract and Brief of Appellants at 492-96. The Supreme Court of Arkansas held that the Advocat Defendants waived their challenge to the sufficiency of the evidence by not renewing their motion for a directed verdict at the close of all the evidence. Pet. App. 15a-16a, 28a-29a. Now, the Advocat Defendants have dusted off those waived arguments and presented them as arguments addressing the amount of punitive damages. However, it is not open to this Court to decide whether Advocat, Inc., or Diversicare Management caused the death of Mrs. Sauer. Nor may the Court decide whether these companies engaged in conduct worthy of punishment. Those avenues are closed because the Advocat Defendants waived their challenges to the sufficiency of the evidence.

Here, applying state law, the Supreme Court of Arkansas held that the Advocat Defendants should be jointly and severally liable for both compensatory damages and punitive

damages. Although the Advocat Defendants were entitled to bring this alleged error in state law to the attention of the Supreme Court of Arkansas through a petition for rehearing, they chose not to do so. Since this is a matter of state law, the appropriate forum for redress, other than through the Arkansas courts, is through the Arkansas legislature. *Cf. Bankers Life*, 486 U.S. at 79-80 (review should not be granted where it might short-circuit less intrusive or more appropriate resolutions, such as action by the state legislature). Earlier this year, the Arkansas legislature enacted a statute that, with very limited exceptions, prohibits the imposition of joint and several liability in actions for personal injury, medical injury, property damage, or wrongful death. Civil Justice Reform Act of 2003, § 1(a). No reason exists for this Court to grant certiorari to federalize a rule that has now been codified by the Arkansas legislature.

V. CERTIORARI SHOULD BE DENIED WITH RESPECT TO THE ADVOCAT DEFENDANTS' REMAINING ARGUMENTS BECAUSE THEY ARGUE NO MORE THAN THAT THE SUPREME COURT MISAPPLIED WHILE PROPERLY STATING THE *GORE* FACTORS.

Almost as an afterthought, the Advocat Defendants devote a small portion of their petition to an argument the gist of which is that the Supreme Court of Arkansas properly stated the *Gore* factors but improperly applied them. That argument presents no basis for granting certiorari in this case.

The Supreme Court of Arkansas carefully considered each of the *Gore* factors, as the opinion of the court shows. Pet. App. 19a-26a. The court also considered this Court's

decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003), which was rendered three weeks before the decision of the Supreme Court of Arkansas was rendered in this case. Pet. App. 20a. The court found that the reprehensibility of the Advocat Defendants' conduct in this case was high. *Id.* at 21a-22a. The Advocat Defendants' only argument regarding reprehensibility goes back to the issue of treating them as one business, as the undisputed testimony of their own chief financial officer showed them to be. Otherwise, they make no argument to show that the Supreme Court erred in finding the reprehensibility of their conduct to be high. Indeed, the fact that they are foreclosed from arguing that they did nothing to cause the death of Mrs. Sauer, coupled with the fact that they were foreclosed from arguing that their conduct was insufficiently reprehensible to warrant punitive damages, means that they have no available argument with which to deny that the reprehensibility of their conduct was high. In light of the jury instruction on punitive damages, the fact that the jury found the Advocat Defendants (and each of them) liable for punitive damages means that the jury found that they (and each of them) knew or should have known that their conduct would naturally and probably result in injury and that they (and each of them) continued such conduct in reckless disregard of the consequences. Hence, unlike BMW and unlike State Farm, the Advocat Defendants evinced indifference to or reckless disregard for the health and safety of others. *Cf. State Farm*, 123 S. Ct. at 1521; *Gore*, 517 U.S. at 576. Obviously, the harm to Mrs. Sauer was not purely economic; it was incalculably worse. As the trial court stated, there can be no comparison between *Gore* and this case. Pet. App. 42a. Nor can there be any comparison between *State Farm* and this case. In *State Farm*, the harm "arose from a transaction in the economic

realm, not from some physical assault or trauma; there were no physical injuries[.]" 123 S. Ct. at 1524-25. Here, a woman died from severe malnutrition and dehydration. Pet. App. 8a.

As to the second *Gore* factor, the ratio of punitive damages to compensatory damages is $21 million to $5.425 million, or approximately 4:1. Obviously, that ratio is consistent with the precedents of this Court. *State Farm*, 123 S. Ct. at 1524; *TXO*, 509 U.S. at 460-62; *Haslip*, 499 U.S. at 23. Oddly enough, the Advocat Defendants contend that, since the victim in this case underwent considerable physical pain and suffering, the ratio of punitive damages to compensatory damages should be lower than in cases such as *Gore* and *State Farm*, where the damages were purely economic in nature. That argument turns the prior rulings of this Court upside down, but it is consistent with the Advocat Defendants' repeated arguments throughout this litigation that substantial punitive damages should not be imposed for starving an elderly woman to death.

As to the comparison between the punitive damage award and comparable penalties, the Advocat Defendants ignore the fact that the State of Arkansas has given notice that conduct of the sort proven at the trial of this case is a felony (or perhaps many felonies) that could result in not only fines and civil penalties but also extended terms of imprisonment. Pet. App. 23a-25a. *Cf. Gore*, 517 U.S. at 583; *Haslip*, 499 U.S. at 23. Ample notice was given that severe sanctions could be imposed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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